IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.86 OF 2006
ALONG WITH
CIVIL APPLICATION NO.314 OF 2006

Mr. C.R. Suresh ... Appellant

Vs.

Mahendra Engineering & Chemical Products Ltd. & Ors. ... Respondents

Mr. Ashok Tajane with Mr. R.B. Jagtap for the appellant.

Mr. S. Shah and Mr. M.M. Shah for the respondents.

CORAM : SMT. RANJANA DESAI & D.B. BHOSALE, JJ.

DATED : 24TH JANUARY, 2006.

P.C.:-

1. The appellant –- defendant 3 in Special Summary Suit No.28 of 2004, in this first appeal has challenged the judgment and order dated 29/8/2005 passed by the 7th Jt. Civil Judge, Senior Division, Pune. Respondent 1 is the plaintiff and respondents 2 and 3 are defendants 1 and 2 respectively. It would be convenient to refer to the parties as per their status in the lower court wherever necessary.

2. The plaintiff filed the said Special Summary Suit against the defendants who are its authorised distributors for a sum of Rs.24,39,318.33 together with

additional amount of Rs.9,09,165.13 being interest and notice charges, etc. The trial court granted leave to defend the suit on the condition that the defendants deposit in the court an amount of Rs.33,79,173/- jointly or severally within one month from the date of the order i.e. 21/3/2005. In default, the said order was to stand vacated. The appellant - defendant 3 challenged the said order by preferring Civil Revision Application No.87 of 2005 in this court. He withdrew the said revision application on 16/8/2005. The defendants then filed Writ Petition No.2847 of 2005 challenging the same order. It was disposed of by this court on 16/8/2005 by ordering the defendants to deposit a sum of Rs.24,39,318/- instead of Rs.33,79,173/-. The time to deposit was extended by four weeks. The defendants failed to comply with this court's order. The trial court considered the documents produced by the plaintiff. It noted that the defendants had failed to deposit the amount as directed by this court. It referred to Order XXXVII Rule 6(b) of the Code of Civil Procedure (for short, “the Code”) and held that since the defendants had failed to defend the claim as per the directions and conditions, the plaintiff is entitled for a decree in the sum of Rs.33,79,173/-. This order is challenged in this appeal.

3. The learned counsel for the appellant submitted that no notice was served on the appellant. He submitted that the appellant was not aware of the order passed by this court on 16/8/2005. It is not possible to accept this submission. There can be no dispute about the fact that the appellant was aware of the conditional order passed by the trial court because he

challenged it by preferring civil revision application. Thereafter, writ petition came to be filed which was dismissed. The appellant was, therefore, very much aware of the conditional order. If the conditional order was not complied with, the consequences provided in law must follow.

4. Mr. Shah, the learned counsel for the respondents has drawn our attention to the judgment of this court in ***M/s. D. Shantilal vs. Bank of Maharashtra, AIR 1989 Bom. 150***, and contended that in view of the fact that the appellant has failed to deposit the amount, the present appeal will have to be dismissed.

5. We find substance in this submission. In that case, suits were instituted against the appellants under Order XXXVII of the Code seeking to recover moneys payable upon bills of exchange. Leave was granted to defend the suits on the condition of deposit of certain amounts. The defendants failed to comply with this order. This court took non-deposit certificates on record and passed the decrees in favour of the plaintiffs. Those judgments and decrees were challenged in this court. After referring to order XXXVII of the Code and the relevant judgments on the point, this court observed as under :

> "..... In other words, when leave is not obtained or leave is refused or where the Defendant fails to comply with a conditional

order, the Defendant is precluded from further contesting the Plaintiffs claim. By reason of the wordings of O. XXXVII Rr.2 and 3 of the Code, there is further disability upon the Defendant. The facts stated in the plaint must be considered to have been admitted by the Defendant and the Plaintiff becomes entitled to judgment. Order XXXVII of the Code not only provides for abridgement of the procedure of suits covered by the said provisions but also the said provisions restrict and/or curtail the rights of the Defendants in these suits to contest the Plaintiffs' claims. When the matter is carried in Appeal, the Defendant who did not obtain leave or had failed to comply with the conditional order continues to suffer under the same disability. It could never be contended that by reason of presenting an Appeal from the ex-parte decree the Defendant would have any greater right to contest the Plaintiff's claim. The Appeals preferred from such ex parte decrees passed in summary suits must proceed on the basis that such Defendants had admitted the Plaintiffs' case as stated in the plaint and that the Plaintiffs were entitled to judgment."

"..... Therefore, even in law although an Appeal lies from the ex parte decree passed under O. XXXVII R.3, the consistent judicial view has been that the finality of a conditional order practically precludes the Defendant-Appellant from assailing the decree on merits."

"..... The defendants who had failed to obtain leave to contest must be deemed to have admitted the contents of the plaints filed by the Plaintiff. Secondly, the Plaintiff Bank had become entitled to a decree."

6. In view of the above, we find no merit in the appeal. The appeal along with the civil application is dismissed.

[SMT. RANJANA DESAI, J.]

[D.B. BHOSALE, J.]